CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Friday, October 27, 1995

Appeal No. AP-94-189

IN THE MATTER OF an appeal heard on May 1, 1995, under section 81.19 of the *Excise Tax Act*, R.S.C. 1985, c. E-15;

AND IN THE MATTER OF a decision of the Minister of National Revenue dated June 23, 1994, with respect to a notice of objection served under section 81.15 of the *Excise Tax Act*.

BETWEEN

BECHTEL-KUMAGAI **Appellant**

AND

THE MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Robert C. Coates, Q.C.
Robert C. Coates, Q.C.
Presiding Member

Charles A. Gracey
Charles A. Gracey
Member

Desmond Hallissey
Desmond Hallissey
Member

Michel P. Granger
Michel P. Granger
Secretary

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

UNOFFICIAL SUMMARY

Appeal No. AP-94-189

BECHTEL-KUMAGAI **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

The appellant is a general contractor that was involved in the construction of a hydro-electric dam in northern Manitoba. The appellant was a licensed manufacturer for federal sales tax (FST) purposes at all relevant times. The appellant purchased certain goods from various licensed manufacturers on the basis that the goods were for use by the appellant in accordance with the provisions of Part XIII of Schedule III to the Excise Tax Act (the Act). The respondent made a determination, pursuant to subsection 116(4) of the Act, that the appellant incorrectly claimed an exemption from FST on certain purchases of goods which were not in fact used for non-taxable purposes. The appellant accepted liability for the payment of FST owing in respect of these goods, but disputed the imposition of interest and penalty under subsection 116(4) of the Act.

***HELD**: The appeal is dismissed. The Tribunal agrees that the legislative intention to impose interest and penalty on a purchaser such as the appellant, that purchases goods from licensed manufacturers on the basis that the goods are for use in accordance with the provisions of Part XIII of Schedule III to the Act and subsequently uses such goods for taxable purposes, is clearly found in sections 78, 79 and 116 of the Act. The Tribunal has no hesitation in concluding that the statutory scheme is meant to impose interest and penalty on a party such as the appellant, even though there is no obligation upon it to file returns or remit taxes. The statutory scheme provides for FST to have been paid by the appellant and then remitted by the seller with which it dealt when that seller made its return, as required under sections 78 and 79 of the Act.*

Place of Hearing:	*Ottawa, Ontario*
Date of Hearing:	*May 1, 1995*
Date of Decision:	*October 27, 1995*
Tribunal Members:	*Robert C. Coates, Q.C., Presiding Member* *Charles A. Gracey, Member* *Desmond Hallissey, Member*
Counsel for the Tribunal:	*Hugh J. Cheetham*
Clerk of the Tribunal:	*Anne Jamieson*
Appearances:	*Michael Kaylor, for the appellant* *Ian McCowan, for the respondent*

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-94-189

BECHTEL-KUMAGAI **Appellant**

and

THE MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: ROBERT C. COATES, Q.C., Presiding Member
CHARLES A. GRACEY, Member
DESMOND HALLISSEY, Member

REASONS FOR DECISION

This is an appeal pursuant to section 81.19 of the *Excise Tax Act*[1] (the Act) of a decision of the Minister of National Revenue dated June 23, 1994.

The appellant is a general contractor that was involved in the construction of a hydro-electric dam in northern Manitoba. The appellant was a licensed manufacturer for federal sales tax (FST) purposes at all relevant times.

The appellant purchased certain goods from various licensed manufacturers on the basis that the goods were for use by the appellant in accordance with the provisions of Part XIII of Schedule III to the Act. The respondent made a determination, pursuant to subsection 116(4) of the Act, that the appellant incorrectly claimed an exemption from FST on certain purchases of goods which were not in fact used for non-taxable purposes. The appellant accepted liability for the payment of FST owing in respect of these goods, but disputed the imposition of interest and penalty under subsection 116(4) of the Act.

By notice of assessment dated December 22, 1989, the appellant was assessed for taxes, interest and penalty on various aspects of the company's transactions in the audit period, including purchases in respect of which an exemption was claimed in error. The respondent issued a notice of reassessment on January 12, 1990, which added amounts for interest and penalty. The appellant objected to the reassessment and, by decision dated June 23, 1994, the respondent varied certain aspects of the reassessment, resulting in a reduction of the amount assessed, including a reduction in interest and penalty. With respect to the imposition of interest and penalty, the respondent rejected the appellant's contention that interest and penalty cannot be applied against the appellant because it was not required to file a sales tax return for tax liability on purchases, on the basis that subsection 116(4) of the Act provides that the purchaser that requests an exemption in writing is liable for the tax, interest and penalty where the goods purchased are used under conditions which render them subject to FST.

The issue in this appeal is whether the appellant is liable to pay interest and penalty imposed under subsection 116(4) of the Act.

1. R.S.C. 1985, c. E-15.

The relevant provisions of the Act read, in part, as follows:

[116.](4) Where a manufacturer or wholesaler holding a licence granted under or in respect of Part III or VI has purchased goods from another such licensed manufacturer or licensed wholesaler and has incorrectly stated or certified that the goods were being purchased for a use or under conditions rendering the sale of the goods exempt from any tax imposed by Part III or VI,

(a) the purchaser and not the manufacturer or wholesaler from whom the goods were purchased is liable to pay the tax and any penalty or interest under subsection 79(1), if

(i) the statement or certificate is in writing, and

(ii) the manufacturer or wholesaler from whom the goods were purchased establishes that he acted with due care and diligence in relying on the statement or certificate of the purchaser; and

(b) in any other case, the purchaser and the manufacturer or wholesaler from whom the goods were purchased are jointly and severally liable to pay the tax and any penalty or interest under subsection 79(1).

79.(1) Subject to subsections (1.1) to (3), a person who defaults in paying tax within the time prescribed by subsection 78(4), in addition to the amount in default, shall pay

(a) in the case of tax required to be paid not later than the last day of a month, a penalty of one-half of one per cent and interest at the prescribed rate, in respect of each month or fraction of a month between that day and the day on which the total tax, penalty and interest outstanding is paid, calculated on the total tax, penalty and interest outstanding in that month or fraction of a month; and

(b) in the case of tax required to be paid not later than the last day of an accounting period, a penalty of one-half of one per cent and interest at the prescribed rate, in respect of each accounting period or fraction of an accounting period between that day and the day on which the total tax, penalty and interest outstanding is paid, calculated on the total tax, penalty and interest outstanding in that accounting period or fraction of an accounting period.

[78.](4) Subject to subsection 79(2) and sections 79.1 and 79.2, the return required by this section shall be filed and the tax payable shall be paid

(a) in a case where the return is required to be made in accordance with subsection (1) or (2), not later than the last day of the first month succeeding that in which the taxes became payable or the sales were made, as the case may be.

The appellant accepted the facts set out in the respondent's brief and, thus, no witnesses were called at the hearing. Counsel for the appellant submitted that the interest and penalty which may become owing pursuant to subsection 116(4) of the Act can only be interest and penalty which would have been owing pursuant to subsection 79(1). Subsection 79(1) refers to subsection 78(4), which requires licensed manufacturers to file monthly returns in respect of taxable sales. In other words, any interest and penalty arising under subsection 116(4) can only flow against a person who is required to file monthly returns, and the appellant is not such a person, insofar as the purchases at issue are concerned.

Counsel for the appellant also submitted that, if Parliament intended to place a party such as the appellant in the position of a licensed manufacturer covered under section 79 of the Act, then it would have

enacted some form of a deeming provision, or equivalent thereto, to reflect this intention. In support of arguing that Parliament had not enacted such a provision, counsel filed a number of documents relating to the administrative practice surrounding the filing of returns.[2] He submitted that there is nothing in these provisions or administrative documents that would call to the appellant's attention the fact that, if it provided a certificate of exemption which ultimately proved unacceptable, it may become liable for interest and penalty.

Counsel for the appellant also submitted that there was authority for the proposition that certificates of exemption were not legally binding[3] and, thus, it would be inappropriate to impose interest and penalty on a purchaser on the basis of a document which itself has no legal authority. Finally, counsel submitted that interest and penalty should not be imposed where a party establishes due diligence.[4]

Counsel for the respondent submitted that there are three conditions that must be met for liability to be imposed under subsection 116(4) of the Act: (1) the transaction involves a licensed manufacturer; (2) a licensed manufacturer buys goods from another licensed manufacturer; and (3) the purchaser claims that the goods are tax-exempt when they are not. Once these conditions have been met, there are two means by which interest and penalty may be imposed, either on the purchaser, on the basis of joint and several liability under paragraph 116(4)(*b*), or on the appellant only, if the seller satisfies the conditions in paragraph 116(4)(*a*), namely, obtaining a certificate or statement of exemption and establishing due diligence. Counsel submitted that, as the appellant was only contesting the application of interest and penalty in respect of paragraph 116(4)(*a*), the appellant had conceded that the conditions of subsection 116(4) had been met and, therefore, the only issue was whether the appellant is liable to pay interest and penalty imposed under that subsection.

Counsel for the respondent submitted that the imposition of interest and penalty under the provisions at issue flows from the failure of the seller to remit FST in a manner that would have occurred had the system functioned properly, i.e. if FST had been paid by the appellant and then remitted by the seller when it made its return, as required under sections 78 and 79 of the Act. In other words, the Act does not create any obligation upon a purchaser to file returns or remit taxes. This obligation stays with the seller, and the possibility of imposing interest and penalty arises when the seller, not the appellant, fails to remit the taxes.

Counsel for the respondent also argued that the Tribunal should reject a narrow technical approach to interpreting the provisions at issue and should instead apply the "modern rule" of statutory interpretation, namely, the "plain meaning" or "words-in-total context" approach. He summarized this approach as meaning that words in a statute are to be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme and object of the Act and the intention of Parliament.[5] He submitted

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2. These included section 6 of the *General Excise and Sales Tax Regulations*, C.R.C. 1978, c. 594, as amended; Excise Memorandum ET 103, Returns and Payment of Tax, Department of National Revenue, Customs and Excise, January 16, 1989; and Form B93 Excise Tax Return, Department of National Revenue, Customs and Excise, the form for returns in effect at the relevant time.

3. Citing *Industrial Electric Contractors Limited v. The Deputy Minister of National Revenue for Customs and Excise* (1986), 11 T.B.R. 254.

4. Citing *Pillar Oilfield Projects Ltd. v. Her Majesty the Queen*, [1993] G.S.T.C. 49, Tax Court of Canada, Court File No. 93-614 (GST)I, November 19, 1993.

5. Citing, among other authorities, *Stubart Investments Limited v. Her Majesty the Queen*, [1984] 1 S.C.R. 536; and *British Columbia Telephone Company v. Her Majesty the Queen*, [1992] 1 C.T.C. 26, Federal Court of Appeal, File No. A-390-91, January 17, 1992.

that, where the words at issue are clear, greater weight should be given to those words and their immediate context, as opposed to assertions about Parliament's intention. He submitted that the provisions at issue are clear in reflecting that what is being traced in terms of the calculation of a date for interest and penalty is the supplier's remittance date and, thus, there is no need for an obligation upon the appellant to file returns or remit taxes.

The Tribunal agrees that the legislative intention to impose interest and penalty on a purchaser such as the appellant, that purchases goods from licensed manufacturers on the basis that the goods are for use in accordance with the provisions of Part XIII of Schedule III to the Act and subsequently uses such goods for taxable purposes, is clearly found in sections 78, 79 and 116 of the Act. This may occur by assessing interest and penalty on the basis of joint and several liability under paragraph 116(4)(*b*) or on a purchaser only, where the conditions in paragraph 116(4)(*a*) are satisfied. In this case, the issue is whether the conditions in paragraph 116(4)(*a*) are satisfied, as the appellant has accepted liability for the payment of FST owing in respect of these goods. This acceptance must be taken as an admission that a "statement or certificate" of the nature required by subparagraph 116(4)(*a*)(i) was provided by the appellant to the seller.

Having been satisfied that this is the appropriate provision under which to consider the imposition of interest and penalty in this case, the Tribunal has no hesitation in concluding that the statutory scheme is meant to impose interest and penalty on a party such as the appellant, even though there is no obligation upon it to file returns or remit taxes. The statutory scheme provides for FST to have been paid by the appellant and then remitted by the seller with which it dealt when that seller made its return, as required under sections 78 and 79 of the Act. The Tribunal, therefore, is not persuaded that other legislative provisions or administrative documentation of the type filed by counsel for the appellant, including certificates of exemption, which may not call to the appellant's attention potential liability for interest and penalty in respect to the transaction at issue, should exonerate the appellant, as subsection 116(4) of the Act clearly provides for the potential liability. Finally, the Tribunal is not persuaded that the appellant has provided evidence that supports a finding that it satisfied any standard of due diligence that may apply in respect of the imposition of interest and penalty in the instant case.

Accordingly, the appeal is dismissed.

Robert C. Coates, Q.C.
Robert C. Coates, Q.C.
Presiding Member

Charles A. Gracey
Charles A. Gracey
Member

Desmond Hallissey
Desmond Hallissey
Member